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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re P.L. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

C.L. et al.,

Defendants and Appellants.

E046549

(Super.Ct.Nos. JJ219267, J219268
& J219269)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J.
Schneider, Jr., Judge. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and
Appellant, C.L.

Michael D. Randall, under appointment by the Court of Appeal, for Defendant and
Appellant, S.W.

Ruth E. Stringer, County Counsel, and Sandra D. Baxter, Deputy County Counsel,
for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minors.

S.W. (mother) appeals from the termination of her parental rights under Welfare and Institutions Code section 366.26¹ as to her daughter E. (born 2005); son K. (born 2006); and daughter P. (born 2007). Mother challenges the sufficiency of the evidence to support the juvenile court's finding of adoptability, as well as the order terminating her parental rights. She also argues the termination order should be reversed, because she has a continuing and beneficial bond with all three children, so an exception to the termination of parental rights applies as set forth in section 366.26, subdivision (c)(1)(B)(i). C.L. (father) joins mother's appeal pursuant to rule 8.200(a)(5) of the California Rules of Court, and also seeks reversal of the order terminating his parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 2005, while mother was at work, father and maternal grandmother took five-month-old E. to the hospital after a "breath-holding spell." At that time, it was determined she suffered from a skull fracture. Although the San Bernardino County Department of Children's Services (DCS) investigated the possibility of child abuse at the time, it was determined to be unfounded. Medical records indicate E. also suffered

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

the following injuries by the time she was 16 months old: (1) a perforated left eardrum with bloody discharge at the age of seven months; (2) an injury to her left foot from a walker at the age of seven months; (3) swelling and bruising along the bridge of her nose at the age of 11 months; and (4) a dislocated elbow at the age of 16 months. Based on these injuries and other evidence, a medical examiner later concluded E. had been abused, stating this was “too many traumas in a child less than 16 months of age.”

When E. was 17 months old, and her younger brother K. was five weeks old, a medical examination revealed K. suffered from head trauma, lacerations to the liver, a hematoma over his right kidney, possible rib fractures, and bruising on his back. The records suggest the injuries occurred when the child was under father’s care. A dependency proceeding was initiated on September 8, 2006, the children were temporarily placed in protective custody, and family reunification services were provided. The children were later returned to the home under a family maintenance plan. The youngest child, P., was born during the proceeding in August 2007. The case was closed by DCS on December 3, 2007.

The instant dependency proceeding was initiated on January 16, 2008, shortly after the case was closed in the prior proceeding. At this time, the oldest child, E., was 34 months old; K. was 17 months old, and P. was four and one-half months old. Dependency petitions pursuant to section 300 were filed as to all three children after K. was brought to the emergency room on January 13, 2008, with second degree burns on the back of his legs, thighs, buttocks, and genitalia. An investigation revealed mother went to the store and left K. at home with father. Father prepared a bath for K. and put

him in the water without realizing the water was too hot. He pulled him out of the water when K. cried and he noticed the child's skin was red. Father was distraught and immediately called mother to come home. The burns had turned to blisters by the time mother arrived home, so she took K. to the hospital. When speaking to hospital workers, mother said, "I knew this was going to happen, I have never bonded with him. . . . I can no longer take this."

DCS decided to take all three children into custody because of the prior history and the nature of K.'s new injuries. When mother was asked where the other two children were, she indicated E. was with her great-grandmother but denied knowledge of P., stating, "I don't know who you are talking about." She later admitted she had informally given custody of P. to the maternal grandmother. Mother then brought both P. and E. to DCS, and they were transported to confidential foster care. Upon his release from the hospital, K. was specially placed in a home equipped to deal with his medically fragile condition.

Subsequent medical evaluations of the children revealed other injuries consistent with child abuse. A few weeks prior to being burned in the scalding bathtub, K. suffered a rib fracture. The youngest child, P., had a healing fracture to her arm, and an MRI scan showed brain injury consistent with shaken baby syndrome.

At the detention hearing on January 17, 2008, the court detained the children and ordered supervised visits for parents once per week. On January 24, 2008, both parents were arrested and charged with child abuse. (Pen. Code, § 273a.) Father was convicted

of child abuse and sentenced to six years in state prison. Mother was also convicted but apparently released and sentenced to three years' supervised probation.

On February 4, 2008, amended petitions were filed containing more detailed allegations of child abuse and abandonment. In the report prepared in anticipation of the jurisdictional/dispositional hearing on February 7, 2008, DCS recommended no reunification services for the parents pursuant to section 361.5, subdivision (b)(6), based on clear and convincing evidence of severe physical harm suffered by the children while in the care of their parents. The social worker also concluded the prognosis for reunification was poor, particularly because harm to the children continued despite one year of services in the prior proceeding, including counseling, parenting, and anger management classes. At the hearing on February 7, 2008, the court continued detention, decided not to place any of the children with relatives, and suspended visits with the parents while they were incarcerated.

In May 2008, after a lengthy, contested jurisdictional hearing, the court found the child abuse allegations in the amended petition to be true, denied reunification services, and set a permanency planning hearing under section 366.26. In a report prepared in anticipation of the section 366.26 hearing, the social worker recommended the termination of parental rights and a permanent plan of adoption by their caregiver. At the section 366.26 hearing on September 2, 2008, the court found clear and convincing evidence all three children would be adopted and terminated parental rights.

DISCUSSION

Adoptability

Mother argues the legislative preference for adoption does not apply because the children have special needs and were not generally adoptable. She contends the juvenile court prematurely determined the children were adoptable based solely on the caregiver's willingness to adopt and without determining whether there were any legal impediments to adoption, including the caregiver's financial ability to care for the children. As a result, she argues substantial evidence did not support the juvenile court's adoptability finding, and, as a result, the juvenile court should have selected a permanent plan other than adoption. We disagree.

We review the juvenile court's order terminating parental rights to determine whether there is substantial evidence in the record from which a reasonable trier of fact could find clear and convincing evidence that the children were likely to be adopted. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510.) "We give the court's finding of adoptability the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of affirming. [Citation.]" (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562.)

Under section 366.26, subdivision (c)(1), the juvenile court "shall terminate parental rights and order the child placed for adoption" if it finds "by a clear and convincing standard, that it is likely the child will be adopted." "The fact that the child is not yet placed in a preadoptive home . . . shall not constitute a basis for the court to conclude that it is not likely the child will be adopted." (*Ibid.*) "If the court finds that

termination of parental rights would not be detrimental to the child . . . and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family. . . . For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more.” (§ 366.26, subd. (c)(3).)

“The issue of adoptability requires the court to focus on the child, and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt. [Citations.]” (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.)

“Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*. [Citation.]” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650, original italics.) Because the focus of the inquiry is on the child, “a parent whose right to care and custody of the child is at stake in a section 366.26 hearing may not inquire about the ‘suitability’ of a potential adoptive family because the family's

suitability to adopt is irrelevant to the issue whether the minors are likely to be adopted. [Citation.]” (*Id.* at p. 1650.)

“[I]n some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child. Where the social worker opines that the minor is likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt the minor, *an inquiry may be made into whether there is any legal impediment to adoption by that parent.*” (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.)

Here, the facts and circumstances do not suggest the social worker’s opinion on the adoptability of the children was based solely on the foster mother’s stated interest in adopting them. Rather, the record indicates the social worker’s opinion was based on the young age of the children, their perceived ability to develop a meaningful relationship with the foster mother, their progress while in foster care, as well as their potential to overcome behavioral and other issues. The social worker acknowledged and addressed the behavioral and/or medical problems each child has as a result of the prior abuse, but still had a sense these difficulties could be managed and/or overcome with adequate parenting and a positive environment. For example, the social worker described E. as “very lively and engaging,” “on target developmentally,” “ahead of her age group” in some developmental areas, and “likes to please her foster family.” In addition, the social worker concluded E. “appears to be appropriately attaching to her caregiver and the caregiver’s family.” The social worker also stated P. “laughs and is playful. She engages

her caregiver by making eye contact, smiling and seeking the attention of her caregiver. [¶] . . . [¶] She has continued to thrive in the care of her current caregiver.” In a later report, the social worker said, “Each child appears to seem content and accepting the warmth of the environment.” Although K.’s injuries as a result of the abuse are significantly more serious, will take additional time to heal, and may require some surgery, a medical examination on July 12, 2008, indicated he was “getting better every day” and doing well in his placement. These factors, as well as the foster mother’s willingness to adopt, all support the determination that the children are likely to be adopted within a reasonable time by their current foster mother or another family. We therefore conclude there is substantial evidence to support the juvenile court’s finding of adoptability.

In reaching our conclusion, we reject mother’s contention the juvenile court erroneously made its adoptability determination without considering whether there were any legal impediments to adoption by the foster mother. To support her argument, mother relies on *In re Carl R.* (2005) 128 Cal.App.4th 1051. However, the facts of that case are distinguishable because the child’s disabilities were so severe he was certain to require intensive care for life and one family was willing to adopt. (*Id.* at pp.1058, 1062.) The child was therefore at great risk of becoming a legal orphan if parental rights were terminated and the prospective adoptive family was later determined to be unsuitable. (*Id.* at p. 1062) Under these circumstances, the appellate court concluded the adoptability assessment should include an inquiry into any legal impediments to the proposed adoption, as well as consideration of whether the prospective adoptive parents could meet

the child's needs. (*Ibid.*) In this case, there is nothing to indicate any of the children will require intensive care for life. In addition, the adoptability determination is not based solely on one family's willingness to adopt. As outlined above, there are other factors indicating the children would not be difficult to place if the foster mother is unable to complete an adoption.

Beneficial Relationship Exception

Mother contends the juvenile court should not have freed the children for adoption because they have a significant positive emotional attachment to her. To support her argument, mother cites her testimony before the juvenile court and the social worker's acknowledgement she has a good relationship with both E. and K.

In pertinent part, the exception set forth at section 366.26, subdivision (c)(1), provides as follows: “[T]he court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

“ ‘Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ ” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) “The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.” (*Id.* at p. 53.) “The parent has the burden to show that the statutory exception applies.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To meet this burden, it is not enough for the

parent to show he or she occupies “a pleasant place” in the child’s life (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324) or to show “frequent and loving contact.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) The exception does not apply “when a parent has frequent contact with but does not stand in a parental role to the child.” (*Id.* at p. 1420.)

For the exception to apply, the parent must show “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.” (*Id.* at pp. 575-576.)

Here, mother has not met her burden of showing termination of her parental rights would be detrimental to any of the children because her relationship with them outweighs the benefits they would gain from an adoption. At the section 366.26 hearing on

September 2, 2008, mother testified she was incarcerated from January 24, 2008, until May 21, 2008, and was not permitted to see her children during this time period. After her release on May 21, 2008, she was allowed monthly visits with the children and had had 4 one-hour supervised visits at the time of the hearing. She had no unsupervised contact with any of the children. From the visits, it is clear the youngest child, P., has no bond with mother. The social worker reported that P. “cries during most of the visit as it appears that the child is not bonded with the mother.” As noted above, P. is “firmly attached to her caregiver and the caregiver’s family” and P. “laughs and is playful. She engages her caregiver by making eye contact, smiling and seeking the attention of her caregiver.” Mother testified P. did not want mother to hold her during visits and “just stares.” According to mother, the relationship did improve somewhat so that she could hold P. and P. would smile. Thus, substantial evidence supports the juvenile court’s conclusion the beneficial relationship exception does not apply as to P.

The social worker reported that K. interacted with mother during visits. Mother testified she has a “good” relationship with K.; he talks with her, calls her mom, and wants to sit on her lap. At the end of the visit, he will give her a kiss, say goodbye, and then go with the foster mother. She acknowledged she had a “hard time” bonding with K. in the past, but was trying to develop a closer relationship with him during the visits. During cross-examination, mother agreed K. had lived outside of her care for half of his life and had developed a special relationship with his caretaker. This is simply not enough evidence to demonstrate the type of bond protected by the exception. Mother does not stand in a parental role to K. and can only show she can have a pleasant visit

with him. Therefore, we can only conclude the trial court was justified in determining the beneficial relationship exception did not apply as to K.

Although the record does show the oldest child, E., has a bond with mother, the circumstances are not in any way exceptional. During her testimony, mother described her relationship with E. as “beautiful.” “She talks. She asks me when she is coming home. She tells me about her day. She’s really excited.” Mother also testified E. has a very difficult time separating from mother when visits are over and says she wants to go home with mother. The social worker also reported E. appears to be attached to mother, will interact with her during visits, and speaks about her days after the visits.

On the other hand, the social worker reported E. has “relapses regarding traumatic events or losses that surface in her nightmares.” She “has chronic nightmares beginning with thrashing in the bed while talking loudly and crying. Later at night, this behavior will elevate to screaming.” Although the nightmares eventually “quieted down,” the social worker testified the nightmares returned after visits with mother. The social worker also reported E. “appears to suffer from ‘flashbacks,’ making statements during play about what happened in the birth parents[’] home to her and her brother.” After visits with mother, E. “is a little upset” and “becomes oppositional with the caregiver” but “will calm down and adjust again until the next visit with mother.” As a result, “[t]he professionals involved recommended no visitation for mother,” and mother agreed to limit visitation to “writing and periodically sending and receiving photos.”

E. also “appears to be appropriately attaching to her caregiver and the caregiver’s family.” Based on observations made during supervised visits with mother, the social

worker testified that all of the children, including E., look to the foster mother as the mother figure in their lives. Based on all of the facts and circumstances, we conclude the bond between mother and E. is not so strong or so positive that it outweighs the statutory preference for adoption. There is no evidence to indicate E. would be “greatly harmed” because of the termination of mother’s parental rights. As a result, the juvenile court appropriately determined the beneficial relationship exception does not apply as to E.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.